IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
LETTERS PATENT APPEAL No 195 of 1999
in
SPECIAL CIVIL APPLICATION No 1202 of 1999

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI

and

Hon'ble MR.JUSTICE C.K.THAKKAR

==========

1. Whether Reporters of Local Papers may be allowed to see the judgement? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MULLA FAIZAL @ FAZILABANU SULEMAN IBRAHIM
Versus
STATE OF GUJARAT

Appearance:
MR UTPAL M PANCHAL for Appellant
Mr.Pujari, Assistant GOVERNMENT PLEADER,
for Respondent No. 1
MS SEJAL K MANDAVIA for Respondent No. 3

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI and
MR.JUSTICE C.K.THAKKAR
Date of decision: 16/02/2000

C.A.V. JUDGEMENT: (Per D.M. Dharmadhikari, C.J.)

1. The facts of this case are extraordinary, calling for grant of extraordinary relief and directions in favour of the appellant. The appellant claims change of entry regarding his sex in the Register of Births maintained under the provisions of Registration of Births and Deaths Act, 1969. The appellant's application for change of entry in the Register of Births regarding his sex having not been granted by the concerned authority, respondent No.3, District Registrar (Births & Deaths) and Chief District Health Officer, the appellant approached this Court by filing a Special Civil Application, which has been dismissed by the learned Single Judge summarily by order dated 17.2.1999 on the ground that the appropriate remedy for the appellant is filing of a civil suit for declaration in the competent civil court.

2. The appellant was born on 28.4.1976 at Umarwada in a rural area of Ankleshwar Taluka. According to the appellant, when he was born, the parents of the appellant could not identify his sex as male or female as the external genitals were ambiguous. Since the appellant's private parts as a new born child looked more like that of a female, the parents of the appellant got his name registered in the Register of Births as a female child. The Register was maintained in Umarwada Gram Panchayat. A birth certificate, Annexure `A', was issued by the Panchayat. Since the appellant's private parts showed some deformity, the parents of the appellant consulted a doctor. The doctor advised them to get the child medically checked up every year in the course of his growth. For the aforesaid reason, the appellant took up his S.S.C. examination as a female. The appellant's parents were worried that even with the growth of age, he did not menstruate as a female. The appellant, however, had started feeling that he was a male. His voice started getting husky and hair began to sprout on his chin and upper lip. The parents of the appellant then took him to the Lokhat Sarvajanik Medical Trust, Surat. The appellant was examined by a Panel of Doctors, consisting of Psychiatrist, Plastic Surgeon and Superintendent of Hospital. On his medical examination by a team of experts, he was given a certificate that he belongs to male gender. His case was diagnosed as one of Perineal Hypospadias, with left undescended testis. According to the doctor's certificate, the appellant is a full male genetically, endocrinologically and psychologically.

3. The doctors, however, advised that some minor operations were required to give a push to the natural process of the appellant's growth as a male. The

appellant underwent three operations, through which the penis, hidden and underdeveloped, was dissected upto the root and its size was made adequate. After the operation, the appellant is a complete male.

4. According to the appellant, although he is a male and comes from a very poor family, as he is not recognized by society as a male, he is unable to earn his livelihood as a male. He was not in a position to obtain licence for rickshaw driving as a male. The appellant wanted to go abroad in Gulf countries for earning his livelihood, but because of his birth certificate to be a female, he could not get a passport as a male.

5. The parents of the appellant on his behalf made an application to the Taluka Development Officer for making necessary changes about the appellant's sex in the records and for issuance of a fresh birth certificate to him, after making corrections in the entry regarding his sex. The Taluka Development Officer sought opinion on his application from respondent No.2, Commissioner, Health, Medical Services and Medical Education. On that opinion sought, the Additional Deputy Chief Registrar of Births and Deaths and Deputy Director (Statistics), Health Medical Services, Medical Education, Gandhinagar, sent advice to the District Registrar, Births and Deaths, and Chief District Medical Officer, District Panchayat, Bharuch. According to the advice, since sex of the appellant is changed by surgical operation, under Section 15 of the Act and Rule 12 of the Rules framed thereunder, the appellant's application for change of entry in the Birth Register regarding his sex cannot be allowed. The appellant, along with his petition, has filed medical literature on the subject of plastic surgery to point out that the appellant's case is not of transsexualism, that is change of sex by operation. He was naturally born as a male, but with deformity in his genital organs. Learned counsel appearing for the appellant took this Court through the relevant medical literature to point out that such deformities or freaks of nature are rare, but have been recognized in the medical science. The appellant, in his case, is not claiming change of entry in the Register of Births regarding his sex on the basis of his change of sex by operation, but he is claiming a change in the entry regarding his sex on the basis that he was born as a natural male child, but since his penis was concealed at the time of birth, there was confusion about the identity of his sex.

6. We have heard learned counsel appearing for the respondent-authorities, who opposed the claim of the

appellant for change of entry regarding his sex and in support of this stand, placed reliance on the letter dated 15.10.1999 of the Government sent by the Deputy Director of Census Operation to the Chief Registrar of Births and Deaths and Director of Health Services and Family Welfare, Himachal Pradesh on a query made by the authority for clarification to them. ....

of the letter dated 15.10.1990 reads :-

> "... I am to invite a reference to your letter No.19/25/77-Med-II-Vol.VIII-1412 dated 01.03.1990 on the above subject and to say that as per the provisions of the RBD Act, 1969, the particulars of vital events registered have to be confined only to the details relating to the event at the relevant time of birth or death. Any subsequent change in the details cannot find a place in the register of births/deaths unless it is provided for in the Act. In the instant case, reported change of sex of Miss Neera Devi from female to male consequent upon a surgical operation is a subsequent change after the event had been registered. Therefore, this change cannot be recorded in the registration records. In this connection, your kind attention is invited to Section 15 of the RBD Act, 1969, which provides for correction and cancellation of entry in the register of births and deaths where such entry is found to be erroneous in the form or substance or has been fraudulently or improperly made. The aforesaid section, therefore, cannot be invoked for correcting subsequent change in sex as there was no registration of birth ...."

A careful reading of the contents of the letter clearly shows that it is applicable only to the case of claim for change of entry of sex made on the basis of change of sex by operation. As the facts reveal, the present case is not one of change of sex of the appellant by operation. His claim is based on the medical opinion that he was born a natural male with some deformity of the sexual organs.

7. Learned counsel for the respondents made an attempt to argue that under the provisions of the Act and the Rules, such a claim for change of entry regarding sex cannot be allowed. We find that the stand taken by the respondent-authorities is wholly unjustified and, in fact, inhuman. The relevant provisions of Section 15 of the Registration of Births and Deaths Act, 1969 and Rule 12 of Registration of Births and Deaths Rules, 1973, framed by the State of Gujarat be noticed, which would show that the appellant is fully justified to invoke the....

entry regarding his sex in the birth register :-

> " ... 15. Correction or cancellation of entry in the registrar of births and deaths - If it is proved to the satisfaction of the registrar that any entry of a birth or death in any register kept by him under this Act is erroneous in form or substance, or has been fraudulently or improperly made, he may, subject to such rules as may be made by the State Government with respect to the conditions on which and the circumstances in which such entries may be corrected or cancelled, correct the error or cancel the entry by suitable entry in the margin, without any alteration of the original entry, and shall sign the marginal entry and add thereto the date of the correction or cancellation .... "
>
> Rule 12. " ... 12. Correction or cancellation of entry in the register of births and deaths : (1) If it is reported to the Registrar that a clerical or formal, error has been made in the register, or if such error is otherwise noticed by him and if the Register is in his possession, the registrar shall enquire in to the matter and if he is satisfied that any such error has been made, he shall correct the error (by correcting or cancelling the entry) as provided in section 15 and shall send an extract of the entry showing the error and how it has been corrected to the District Registrar.
>
> (2) In the case referred to in sub-rule (1) if the register is not in his possession, the Registrar shall make a report to the District Registrar and call

for relevant register and after enquiring in to the matter, if he is satisfied that any such error has been made, make the necessary correction.

(3) Any such correction as mentioned in sub rule (2) shall be countersigned by the District Registrar when the register is received from the Registrar.

(4) If any person asserts that any entry in the register of births and deaths is erroneous in substance, the Registrar may correct the entry in the manner prescribed under section 15 upon production by that person a declaration setting forth the nature of the error and true facts of the case made by two credible persons having knowledge of the facts of the case.

(5) Notwithstanding anything contained in sub rule (1) and sub rule (4), the Registrar shall make report of any correction of the kind referred to therein giving necessary details to the District Registrar.

(6) If it is proved to the satisfaction of the Registrar that any entry in the register of births and deaths has been fraudulently or improperly made, he shall make a report giving necessary details to the officer authorized by the Chief Registrar under section 25 and shall act according to the directions of the officer so authorized.

(7) In every case in which an entry is corrected or cancelled under this rule, intimation thereof should be sent to the permanent address of the person who has given information under section 8 or section 9 .... "

(underlining for emphasis)

8. We need not go in detail into the medical literature that has been produced before us as that would be a subject matter of enquiry before the respondent-authorities. It is enough for us to mention that such a freak of nature is ....

science. Physical phenomenon `hypospadias' has been defined in Butterworths Medical Dictionary as under :-

> " ... Hypospadias. A congenital defect of the wall of the male urethra or of the vagina so that instead of the normal external orifice there is an opening for a greater or lesser distance on the under-side of the penis or in the vagina .... "

As has been explained on the basis of medical literature produced on behalf of the appellant, contained in Annexure `F', the learned counsel explains that in cases of such deformities at the time of birth, the genital organ or the male organ in the case of t.....

concealed under the surface of the skin and the penis had to be opened by performing a surgery. In Modi's Medical Jurisprudence with regard to the sexual potency of such cases of hypospadias, the following opinion has been expressed :-

> " ... Hypospadias, which is characterized by the urethral orifice being situated on the undersurface may be associated with male pseudohermaphroditism, does not, as a rule, produce incapacity for sexual intercourse, unless it is associated with a marked deformity of the penis which may interfere with its intromission into the vagina. Sterility in such a case depends upon the position of the urethral orifice, and it is assumed if the urethral orifice is so placed as to prevent the deposition of semen within the labia of the vulva. Spermatozoa, if deposited within the labia, can certainly travel upwards into the vaginal canal owing to their motile power .... "

We are surprised to find that the respondent-authorities are opposing the petition on an unreasonable ground. The provisions of Section 15 of the Act clearly permit correction of an entry in the Register of births if it is found to be "erroneous in form or substance or has been ... improperly made."

9. Sub-rule (4) of Rule 12 quoted above allows the concerned authority, i.e. the Registrar, to correct the entry regarding birth in the birth register if the same

is erroneous in substance. The person seeking change of entry has to set forth the nature of the error and true facts of the case and support the same by two credible persons having knowledge of the facts.

10. Since the respondent-authorities, who are in charge of maintenance of Register of Births, have been enjoined with a duty to entertain applications for correction of entries in the Register and can for that purpose make necessary enquiries, the learned Single Judge was not right in relegating the appellant to a remedy of civil suit for seeking a declaration regarding his sex. In our considered opinion, the authorities, under the provisions of Section 15 read with Rule 12 of the Rules framed thereunder, are duty-bound in law to make necessary enquiries and if necessary to obtain medical opinion to grant change of entry in the birth register regarding the sex of the appellant and to issue to him a corrected birth certificate. We find absolutely no legal impediment in the same and the reliance on the letter quoted above is totally misplaced. The said letter does not at all apply to the case like the present one. Here the change in the entries in the Register is sought not on the basis of change of sex, but on the basis that the appellant was born as a natural male although with some deformity in his sexual organ. It would not be proper for the court to relegate the appellant to an onerous remedy of civil suit even if that be held to be available to him.

11. As a result of the discussion aforesaid, we allow this appeal, set aside the order of the learned Single Judge dated 17.2.1999 and allow the Special Civil Application. The respondents are directed to hold an enquiry on the application made by the appellant for change of entry of sex in the Register of Births. The appellant shall be given a notice by the respondents for appearance before them, with all documentary and oral evidence, to substantiate his claim for change of entry regarding his sex in the Register of Births. Let the respondents complete the enquiry within a reasonable period of three months from the date of service on them of a copy of this judgment and pass consequential orders of granting change in the entry regarding sex in the Register of Births and issue certificate on the said entry to the appellant if he is able to substantiate his claim before the authorities. Let the order be obeyed within the time allotted by this Court and without any further delay. Direct service is permitted.

****

(apj)